UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 204

Docket No. NY-3330-09-0227-I-1

Richard A. Becker,

Appellant,

v.

Department of Veterans Affairs,

Agency.

October 15, 2009

Richard A. Becker, Coram, New York, pro se.

Aaron J. Fields, Esquire, Brooklyn, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition and REMAND this appeal to the regional office for further adjudication regarding the appellant's claims under the Veterans Employment Opportunities Act of 1998 (VEOA).

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency did not select him for the GS-6 position of Administrative Support Assistant in violation of his rights under VEOA. Initial Appeal File (IAF), Tab 1. During proceedings before the

administrative judge, the appellant submitted a copy of a letter from the Department of Labor (DOL), dated June 2, 2009, stating that it had "opened [his] claim as of May 11, 2009" and asking that the appellant provide a number of documents. IAF, Tab 8.

¶3 The administrative judge found that the appellant could not directly appeal his non-selection to the Board. IAF, Tab 9 (Initial Decision (ID)) at 2. She also found that, although the Board could consider an appeal of a non-selection as a violation of a preference eligible's rights under VEOA, as of July 2, 2009, the date she issued the initial decision, 60 days had not elapsed since the appellant filed his complaint with DOL and, thus, the Board could not assert jurisdiction over the VEOA appeal. ID at 2-3.

¶4 The appellant petitions for review. Petition for Review File (RF), Tab 1. The agency responds in opposition to the petition. RF, Tab 5.

ANALYSIS

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. *Covington v. Department of the Army*, 85 M.S.P.R. 612, ¶ 9 (2000). It is well-settled that the Board lacks direct jurisdiction under 5 U.S.C. § 7512 over an employee's non-selection for a position. *See Gryder v. Department of Transportation*, 100 M.S.P.R. 564, ¶ 9 (2005). Thus, we find no basis to reverse the administrative judge's findings on this issue.

¶6 Despite the general lack of Board jurisdiction over a non-selection, an appellant may appeal his non-selection for a promotion by other statutory means, such as through a VEOA appeal. *See Phillips v. Department of the Navy*, 110 M.S.P.R. 184, ¶ 5 (2008). To establish Board jurisdiction over an appeal

brought under VEOA, an appellant must: (1) show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (a) he is a preference eligible within the meaning of VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a. An individual who files a complaint with DOL alleging a violation of his rights under VEOA has exhausted his remedy with DOL and may file an appeal with the Board upon receiving notice from DOL that the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. 5 U.S.C. § 3330a(d)(1). A VEOA appeal filed with the Board without a showing that the appellant has exhausted his remedy with DOL will be dismissed for lack of jurisdiction. *See Graf v. Department of Labor*, 111 M.S.P.R. 444, ¶ 5 (2009).

¶7 It is undisputed that, as of the date the administrative judge issued the initial decision in this case, 60 days had not elapsed since DOL opened the appellant's claim, and the appellant had not submitted evidence the Secretary of Labor notified him that DOL was unable to resolve the complaint; however, attached to the appellant's petition for review is a letter from DOL dated July 1, 2009, stating that his complaint against the agency was being closed. RF, Tab 1. The file number on DOL's letter of July 1, 2009, is the same as the file number on the letter that the appellant submitted into the record in which DOL stated that it had opened the appellant's claim; both files are identified as US Dept. of Veterans Affairs, NY-2009-013-VPH. IAF, Tab 8, RF, Tab 1.

¶8 Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). To constitute new evidence, the information contained in the documents, not just the documents

themselves, must have been unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). Although the letter from DOL that the appellant submits with his petition for review is dated 1 day before the issuance of the initial decision, it is unlikely that the appellant received the letter before the issuance of the initial decision and thus we find that it was unavailable before the record closed despite the appellant's due diligence. *See Williamson v. U.S. Postal Service*, 106 M.S.P.R. 502, ¶ 7 (2007) (a DOL letter providing notice that it has closed an investigation is presumed to have been received 5 days after it was issued). Further, the information in the letter from DOL also was unavailable despite the appellant's due diligence when the record closed. *See Grassell*, 40 M.S.P.R. at 564. Thus, we accept the letter as new evidence.

¶9 For the Board to consider evidence submitted on petition for review, it must also be material. To be material, the evidence must be of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). Because the threshold issue to be decided in this case is jurisdiction, the new evidence must be material to the issue of Board jurisdiction.

¶10 The only jurisdictional issue adjudicated in this case is whether the appellant showed that he exhausted his remedy with DOL and thus may file a VEOA appeal with the Board. As noted above, if, after an appellant files a complaint with the Secretary of Labor, he notifies the appellant that he is unable to resolve a VEOA complaint within 60 days after the date on which it is filed, the complainant has exhausted his remedy with DOL and may elect to appeal the alleged violation to the Board. *See* 5 U.S.C. § 3330a(d)(1); 5 C.F.R. § 1208.22(a). The letter that the appellant submits with his petition for review establishes that the Secretary of Labor was unable to resolve the appellant's complaint within 60 days. Thus, the appellant has shown that he exhausted his

remedy with DOL and has established that the Board has jurisdiction over his VEOA appeal.

ORDER

¶11 Accordingly, because the appellant has established jurisdiction over his VEOA appeal, we REMAND this case to the regional office for further adjudication consistent with the Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.